U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2004

BALCA Case Nos.: 2003-INA-262, 267
ETA Case Nos.: P2001-CA-09511317/LA, P2001-CA-09511316/LA

In the Matters of:

IGBANTE-ENRIQUEZ CARE HOME,
Employer,

on behalf of

DENNIS VELASCO,

and

MA. RAYCILLE VELASCO,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Aliens

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arises from two applications for labor certification[1] filed by Igbante-Enriquez Care Home ("the Employer") on behalf of two aliens for the position of Nurse

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

Assistant. (AF 101-102).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On February 5, 2001, the Employer filed an application for alien labor certification on behalf of the Alien for the position of Nurse Assistant. (AF 101-102). The Employer required four years of high school education and three months of experience in the job offered. The duties of the job included caring for six developmentally disabled patients in a care home, including assisting with their personal hygiene needs, cleaning their rooms and the home, preparing and serving meals, dispensing medication, and monitoring patient activities. The Employer required a live-in worker, on-call twenty-four hours per day, with a split shift schedule. (AF 101).

On February 24, 2003, the CO issued a Notice of Findings ("NOF") indicating the intent to deny certification based on a number of grounds. (AF 94-99). The CO stated that there was a question as to the bona fide nature of the job opportunity. The CO found that the license submitted for the care home was inconsistent with the Employer's description of the patients' conditions. The Employer was instructed to submit descriptions of the patients' diagnoses and prognoses, as well as documentation showing that there was an ongoing business. (AF 95). The CO also noted that the job duties involved a restrictive combination of duties of houseworker and nurse assistant. The CO instructed the Employer either to delete the combination and retest the labor market or to justify the combination as based on business necessity. (AF 96).

[2] In this decision, AF refers specifically to the Dennis Velasco Appeal File as representative of the Appeal File in both cases. A virtually identical application was filed for the Aliens and the issues raised and dealt with by the CO (*ie*., NOF, FD, etc.) in these cases are identical.

The CO further found that the requirements to live on the premises, to be on call twenty-four hours per day, and to work a split shift were restrictive. The Employer was instructed to delete the requirements or to justify them based on business necessity. (AF 97-98). The CO also found that the employment contract was deficient and advised the Employer to submit an amended contract. (AF 98-99).

On April 1, 2003, the Employer submitted rebuttal. (AF 19-93). The Employer provided a copy of the license to operate the care home and a copy of the latest renewal of this license. (AF 31-33). The Employer also provided wage reports showing wages paid to an employee. (AF 48-51). The Employer included patient reports, showing patients' conditions and capacities for self-care. (AF 34-46). As to the restrictive combination of duties, the Employer stated its willingness to readvertise and presented a draft advertisement deleting the duties of cleaning, laundry, and food preparation. (AF 55).

The Employer stated that the live-in and on duty twenty-four hours per day requirements were necessary because the patients could not be left alone and needed someone available during the night to lift them out of bed and help them to the restroom. The Employer noted that the workers would be paid extra if they had to respond to patients' needs during the night. (AF 58-59). The Employer further noted that the patients are out of the facility during the day and this schedule justifies the split shift requirement. (AF 81). The Employer provided patient schedules to document this assertion. (AF 83-84). The Employer included an employment contract which noted the live-in, split shift and on-call requirements. (AF 85).

On June 6, 2003, the CO issued a Final Determination ("FD") denying certification. (AF 16-18). The CO noted that the Employer had established a bona fide job opportunity working with ambulatory, developmentally-disabled patients. (AF 17). However, the CO stated that although the Employer had deleted some of the duties causing the restrictive combination of duties, the Employer had retained the duties of

preparing and serving meals and failed to justify these duties based on business necessity. The CO found that the Employer had not justified the live-in, split shift, or on-call requirements as based on business necessity. With respect to the live-in and on-call requirements, the CO noted that the patient reports were inconsistent as to the level of care required by the patients. Specifically, the CO noted that all of the residents had the capacity for self-care, which was inconsistent with the Employer's statements that they required assistance with personal needs. (AF 18). As to the split-shift requirement, the CO found that the Employer attempted to justify this requirement by arguing that the patients were out of the home during the day. However, the CO noted that the job required duties that did not involve patient care and therefore, these could be performed while the patients were not in the facility. Therefore, the CO determined that these requirements had not been justified by business necessity and denied certification.

On July 10, 2003, the Employer requested review of the denial. (AF 1-15). The Employer again stated its willingness to readvertise. This matter was docketed by the Board on August 5, 2003.

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The use of unduly restrictive job requirements has a chilling effect on U.S. applicants and the purpose of the regulation is to ensure that the job opportunity is open to U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*). To be considered unduly restrictive, the requirement must be one that is not normal to the occupation or is not listed in the *Dictionary of Occupational Titles* ("DOT") for the position. To justify the inclusion of the unduly restrictive requirement, the employer must establish business necessity for the requirement. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

To establish business necessity, the employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's

business, or that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Id.* For business necessity in live-on-the-premises cases, the employer must demonstrate the second prong of the *Information Industries* test, that the requirement is essential to performing the job duties. *Marion Graham*, 1988-INA-102 (Mar. 14, 1990) (*en banc*).

In this case, the Employer has not demonstrated the business necessity for the requirements to live-in, to be on-call twenty-four hours per day, and to work a split shift. The Employer stated that the worker must be available to respond to the needs of the patients in the middle of the night. The Employer has not given any explanation as to why a second shift of caregivers could not work during the night. There is no reason to have only one worker on-call twenty-four hours a day to respond to patient needs. The Employer has not stated a reason why another worker could not cover the night shift and eliminate the need for a live-in worker. The Employer's bare assertion that the patients need care twenty-four hours a day, while it may be true, is insufficient to establish that one worker, living in the facility, must provide this care.

Furthermore, the state regulations regarding care homes do provide that someone must be on-call twenty-four hours per day. However, the Employer has not demonstrated that this means a worker must live on the premises to be responsible twenty-four hours per day. A second worker or shift of workers could satisfy the requirement that a caregiver be available twenty-four hours per day, and relieve the burden for the worker to live on the premises. The Employer has not presented any evidence that this requirement is essential for the worker to perform the duties and thus has not justified the live-in requirement based on business necessity. This is also true for the on-call requirement and the split-shift requirement. With the addition of another worker, a single worker does not need to be available at every moment the patients are in the home. The Employer failed

to justify these requirements based on business necessity. As such, labor certification was properly denied and the remaining issues need not be addressed.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

[3] It should be noted that although the Employer offered to readvertise, the Employer failed to delete all the restrictive requirements in the draft advertisement. (AF 7, 55). Therefore, the offer to readvertise did not eliminate the deficiency and was unacceptable.